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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF:

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ISABELLE AFRIAT ET AL.:

EXAMINER: BENNETT

SERIAL NO.: 09/610,320

:

FILED: JULY 5, 2000:

GROUP ART UNIT: 1615

FOR: SOLID COMPOSITION AND ITS
USES, IN PARTICULAR ITS
COSMETIC USES

DECLARATION UNDER 37 C.F.R. 1.132

ASSISTANT COMMISSIONER FOR PATENTS
WASHINGTON, D.C. 20231

SIR:

I, Carole Guinamand hereby declare:

1. I am employed by L'ORÉAL as an engineer and have experience in the field of preparing and analyzing cosmetic and/or dermatological compositions.
2. The following observations and experiments were carried out by me or under my direct supervision and control.
3. The following composition ("Composition A") was made in accordance with the teachings of U.S. patent 5,851,539 (Mellul), particularly Mellul's example 29.

Oily Phase

Pentacyclomethicone	21.2%
Polyethylene wax	3%
Abil WE 09	3%

Aqueous Phase

Glycerol	5%
Magnesium sulfate	0.7%
Water	67.1%

Composition A contains pentacyclomethicone instead of the fluorinated silicone oil in Mellul's example 29 which is no longer available. I do not believe that this substitution materially affects the properties of the resulting composition. Also, Composition A contains 3% polyethylene wax, whereas Mellul's example 29 does not contain wax. Adding 3% wax makes Composition A more like the claimed invention which requires the presence of at least 3% wax than Mellul's example 29 which does not contain wax.

4. Composition A did not exhibit a compressive strength of greater than or equal to 50 grams, at room temperature, after penetration by a cylindrical probe having a diameter of 0.8 cm into the composition over a thickness of 5 mm at a rate of 1 mm/s. Moreover, Composition A did not possess a matte appearance.

5. Example 2 of the present application was also reproduced. In contrast to Composition A, the composition of example 2 exhibited a compressive strength of greater than or equal to 50 grams, at room temperature, after penetration by a cylindrical probe having a diameter of 0.8 cm into the composition over a thickness of 5 mm at a rate of 1 mm/s. Moreover, the composition of example 2 had a matte appearance.

6. Because solidity (as measured by compressive strength) and the existence of a matte appearance are indicative that a composition is grainy, it follows that the composition of example 2 was grainy. However, because comparative Composition A did not exhibit the compressive strength characteristics set forth above and did not possess a matte appearance, it follows that Composition A was not grainy.

7. The distinction between “grainy” and “non-grainy” compositions is significant. Graininess provides the claimed emulsions with a range of textures, and this range of textures contributes to the fresh feeling associated with such emulsions upon application. In contrast, non-grainy compositions do not possess the same fresh feeling upon application. This difference in solidity, appearance and, thus, graininess between Composition A and Example 2 was unexpected and surprising, and resulted in compositions possessing significantly different cosmetic properties important to consumers such as, for example, feeling upon application to skin. Because Example 2 possessed application characteristics which are much more desirable to consumers than Composition A, Example 2 would be expected to be significantly more commercially successful than Composition A.

8. Based on my knowledge and experience in this field, I would expect that any composition containing an aqueous phase and an oily phase including a silicone emulsifier and a wax, wherein the aqueous phase is dispersed in the oily phase; the aqueous phase is present in at least 75% by weight with respect to the total weight of the composition; the wax is present in at least 3% by weight with respect to the total weight of the composition; the composition exhibits a compressive strength of greater than or equal to 50 grams, at room temperature, after penetration by a cylindrical probe having a diameter of 0.8 cm into the composition over a thickness of 5 mm at a rate of 1 mm/s; the oily phase/silicone emulsifier ratio by weight is equal to or greater than 5; and the composition contains at least 70% water with respect to the total weight of the composition would be grainy and, thus, would have similar properties to the composition of Example 2.

9. The undersigned petitioner declares further that all statements made herein of her own knowledge are true and that all statements made on information and belief are believe to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under

Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of this application or any patent issuing thereon.

9. Further deponent sayeth not.

Guirmand Carole
Name

Guirmand
Signature

October 9 2003
Date